

# Plan Qualification - R&A Breakout

## CPE 2013

### Recent Updates to the Cumulative List (2010-2011)

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#### Introduction

This breakout topic is intended to introduce the new items that first appear on the 2010 and 2011 CLs. For each item, we will list:

- Its Code section in the order it appears on the CLs,
  - Whether the item is an interim (required) or discretionary (optional) amendment,
  - Whether or not the plan must adopt an interim amendment,
  - The amendment's effective and due dates, and
  - A description of its related law change or guidance.
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#### Note

Any reference in this chapter to “cumulative list” will be the 2011 CL found in Notice 2011-97.

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## Notice 2009-86, Notice 2012-29, Normal Retirement Age

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§ 401(a)  
Notice 2009-86

No amendment required.

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**Effective Date**

Effective for plan years beginning after December 31, 2012.

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**Summary**

In Notice 2008-98, the Service announced its intention to amend the Normal Retirement Age (NRA) regulations and to change the effective date for governmental plans to plan years beginning on or after January 1, 2013.

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**Notice 2012-29**

**Note:** In Notice 2012-29 the Service stated its intention to amend the 2007 NRA regulations to change the effective date for governmental plans to annuity starting dates that occur in plan years beginning on or after the later of:

- (1) January 1, 2015, or
- (2) The close of the first regular legislative session of the legislative body with the authority to amend the plan that begins on or after the date that is 3 months after the final regulations are published in the **Federal Register**.

Governmental plan sponsors may rely on this notice for this extended effective date until the 2007 NRA regulations are amended.

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## Notice 2009-86, Notice 2012-29, Normal Retirement Age, Continued

### 2007-NRA Regulations

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[Notice 2012-29](#) clarified how Treas. Reg. [§1.401\(a\)-1\(b\)](#) (the 2007 NRA regulations) was applicable to Code §414(d) governmental plans.

The guidance under consideration would:

- Clarify that governmental plans don't need to have a definition of normal retirement age if they don't provide for in-service distributions before age 62, and
  - Expand the age-50 safe harbor rule in the 2007 NRA regulations, which currently applies only for plans in which substantially all of the participants are qualified public safety employees, to also apply to a group substantially all of whom are qualified public safety employees (see [§1.401\(a\)-1\(b\)\(2\)\(v\)](#)). This would mean that a governmental plan could satisfy the normal retirement age requirement by using a NRA as low as 50 for qualified public safety employees, and a later NRA that otherwise satisfies the requirements in the 2007 NRA regulations for other participants.
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## Rev. Rul. 2011-1

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**§ 401(a):**  
**Rev. Rul. 2011-1**

Required for group trusts that intend to hold assets from a Code:

- § 403(b)(7) custodial account,
  - § 403(b)(9) retirement income account, or
  - § 401(a)(24) governmental retiree benefit plan.
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**Effective Date**

Effective for group trusts beginning January 10, 2010.

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**Summary**

Group trusts may generally hold the assets for multiple qualified plans under § 401(a). The types of plans that could invest assets in a group trust were outlined in Rev. Rul. 81-100 with modifications made by Rev. Rul. 2004-67 and Rev. Rul. 2008-40.

Rev. Rul. 2011-1 expands the plan types that may invest in a Group Trust to custodial accounts under § 403(b)(7), retirement income accounts under § 403(b)(9), and governmental retiree benefit plans under § 401(a)(24).

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## Section 401(a)(9)(H), Notice 2009-82

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### § 401(a)(9)(H) Notice 2009-82

Optional provision.

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### Effective Date

For plans that choose to implement this change in 2009 - on or before the last day of the first plan year beginning after Dec. 31, 2010.

For governmental plans, - on or before the last day of the first plan year beginning after Dec. 31, 2011.

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### Summary

Added to the Required Minimum Distribution (RMD) rules:

- RMDs do not apply to defined contribution plans and IRAs for 2009 (Code section 401(a)(9)(H)(i)).
- For participants in plans that did not give participants the ability to skip their 2009 RMD as of Nov 30, 2009 could roll over under § 402(c) as long as they did so before Nov. 30, 2009 (Notice 2009-82).
- WREDA §201(a) added Code § 401(a)(9)(H).

Background:

- All DC plans must comply with the § 401(a)(9) provides required minimum distribution (RMD) rules for § 401(a) plans. Section 402(c) generally provides that the payment of any portion of an employee's interest in a qualified trust to the employee or the employee's surviving spouse in an eligible rollover distribution is not includible in gross income if the distribution is rolled over to an eligible retirement plan no later than the 60th day following the day of receipt. WREDA § 201(a) added Code § 401(a)(9)(H).
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## Notice 2011-19, Sections 401(a)(22) and 401(a)(28)

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**§ 401(a)(22)**  
**Notice 2011-19** Required for plans that can invest in “readily tradable on an established securities market” and “readily tradable on an established market” under these Code sections:

§ 401(a)(22), § 401(a)(28)(C), § 409(h)(1)(B), § 409(l), and § 1042(c)(1)(A).

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**Effective Date** Effective for plan years beginning on or after January 1, 2012.

However, the notice is effective for plan years beginning on or after January 1, 2013, for any plan that is sponsored by an employer where neither the employer nor any members of its controlled group (under § 409(l)) have:

- Any stock traded on a registered national securities exchange on March 14, 2011,
- But do have on this date, stock traded on a foreign national securities exchange that is officially recognized, sanctioned or supervised by a governmental authority, and is deemed by the SEC as having a ready market (SEC Rule 15c3-1).

See Treas. Reg. § 1.401(a)(35)-(1)(f)(5)(B).

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**Summary** Final regulations under § 401(a)(35) were issued on May 18, 2010 (75 FR 27927). Under § 1.401(a)(35)-1(f)(5), a security is readily tradable on an established securities market if the security is traded on a national securities exchange that is registered under section 6 of the Securities Exchange Act of 1934 (15 U.S.C. 78f). The regulations also treat a security as readily tradable on an established securities market if the security is traded on a foreign national securities exchange that is officially recognized, sanctioned, or supervised by a governmental authority and where the security is deemed by the Securities and Exchange Commission (SEC) as having a ready market under SEC Rule 15c3-1. Under Notice 2011-19, the terms *readily tradable on an established securities market* and *readily tradable on an established market*, with respect to employer securities, each mean employer securities that are readily tradable on an established securities market within the meaning of § 1.401(a)(35)-1(f)(5) for purposes of the following provisions: (1) § 401(a)(22); (2) § 401(a)(28)(C); (3) § 409(h)(1)(B); (4) § 409(l); and (5) § 1042(c)(1)(A).

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## Notice 2011-19, Sections 401(a)(22) and 401(a)(28), Continued

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**§ 401(a)(28)(C)** Same as item above.  
**Notice 2011-19**

See Notice 2011-19, which provides that the terms “readily tradable on an established securities market” and “readily tradable on an established market” mean:

- Employer securities that are readily tradable on an established securities market within the meaning of Treas. Reg. § 1.401(a)(35)-1(f)(5) for purposes of Code § 401(a)(28)(C) (Notice 2011-19).

Effective for plan years that begin on or after January 1, 2012, except for certain plans that have a delayed effective date.

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## Notice 2009-97, Section 401(a)(35)

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<b>§ 401(a)(35) Notice 2009-97</b>	Required for DC plans that hold publicly traded employer securities. Amendment due by the end of the 2010 plan year.
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<b>Effective Date</b>	Effective for plan years beginning after December 31, 2010.
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<b>Summary</b>	<p>Pension Protection Act of 2006 (PPA '06) § 901(a)(1) added Code § 401(a)(35). Final regulations published on May 19, 2010, clarify:</p> <ul style="list-style-type: none"><li>• The term “publicly traded employer security,”</li><li>• The rules for alternate investment options for those participants who chose to divest themselves of employer securities in their account balance,</li><li>• The timing rules for when a participant must have the opportunity to re-invest in other investment options, and</li><li>• The notice requirements that plans must provide to the participants.</li></ul>

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## Section 401(a)(37)

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**§401(a)(37)** Required provision for all plan types.

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**Effective Date** Effective for deaths occurring during military service on or after January 1, 2007.

Amendments due last day of the 1st year beginning after December 31, 2009.  
For governmental plans, amendments due by December 31, 2011.

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**Summary** Section 104(a) of the HEART Act added Code §401(a)(37). Section §401(a)(37) provides, in the case of a participant who dies while performing qualified military service, a qualified plan must state that:

- Survivors of the participant are entitled to any additional benefits that the plan would have been provided if the participant resumed employment and then died, such as accelerated vesting, ancillary life insurance benefits, or other survivor benefits that are contingent on the participant's death while employed, and
- Benefit accruals, relating to the period of qualified military service that would have been provided under the plan had the participant resumed employment and then terminated employment on account of death, would not be required.

Section 104(d)(1) of the HEART Act states that the amendments made by section 104 of the Act apply with respect to deaths and disabilities occurring on or after January 1, 2007.

Notice 2010-15 contains questions and answers on many provisions of the HEART Act.

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## Notice 2010-15, 401(k) and (m)

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### **§ 401(k)&(m) Notice 2010-15**

Optional provision.

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### **Effective Date**

For plans that choose to implement this change, the amendment is due by the last day of the first plan year beginning on or after January 1, 2010 (January 1, 2012 for governmental plans).

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### **Summary**

Pursuant to amendments made by PPA '06, Code §72(t)(2)(G) provides that the 10-percent additional income tax does not apply to a Qualified Reservist Distribution (QRD). A QRD is a distribution:

- From an IRA, or
- Of elective deferrals under a §401(k), §403(b) or §501(c)(18) plan, and,
- To a reservist ordered or called to active duty for more than 179 days or for an indefinite period.

A QRD distribution can be made without regard to the otherwise applicable restrictions on §401(k) and §403(b) elective deferrals in-service distributions.

An individual who receives a QRD may make IRA contributions to an IRA up to the amount of the QRD, which are not subject to the IRA contribution limits and are not deductible during the two-year period beginning the day after the end of the individual's active duty service. (§72(t)(2)(G)(iii)).

HEART Act §107 amended Code §72(t)(2)(G) to delete the reference to December 31, 2007, which was the date that individuals had to be ordered or called to active duty for the special QRD rules to apply. Now these special QRD rules no longer have an expiration date.

### **Background:**

Under current law, a taxpayer who receives a distribution from a qualified retirement plan prior to age 59½, death, or disability is generally subject to a 10 percent additional income tax under § 72(t) unless an exception applies.

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## Section 402A(c)(4), Notice 2010-84

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### § 402A(c)(4) Notice 2010-84

Optional provision.

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### Effective Date

For plans that choose to implement this change, amendments are due on the later of:

- The last day of the plan year in which the amendment is effective, or
- December 31, 2011.

The amendment must be effective as of the date the plan first operates in accordance with §402A(c)(4).

Governmental 457(b) plans can be amended to include designated Roth accounts and allow in-plan Roth rollovers for taxable years beginning after 2010.

The amendment is effective as of the date the plan first operates in accordance with the amendment for distributions made after September 27, 2010.

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### Summary

Plans with a [designated Roth program](#) may allow participants to transfer eligible rollover distributions to a designated Roth account from another account in the same plan. The Roth contribution program must be in place before a plan can offer in-plan Roth rollovers. A Roth program cannot be set up solely to accept in-plan rollovers – it must also accept pre-tax elective deferrals from participants.

Section 2112 of SBJA added Code §402A(c)(4), which requires that the taxable amount of the distribution must be included in the participant's gross income. However, Notice 2010-84 allows for rollovers in 2010 to be recognized as income reported half in 2011 and half in 2012. Instead of using this default rule, a participant could have elected to include all of the recognizable income in 2010 if they so elected.

[Retirement Plans FAQs on Designated Roth Accounts](#)

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## Section 409, Notice 2011-19

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### **§ 409 Notice 2011-19**

Required for plan that defines “readily tradable on an established securities market” and “readily tradable on an established market” under these Code sections:

§ 401(a)(22), § 401(a)(28)(C), § 409(h)(1)(B), § 409(l), and § 1042(c)(1)(A).

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### **Effective Date**

Notice 2011-19 is effective for plan years beginning on or after January 1, 2012, except for certain plans that have a delayed effective date. See 401(a)(22) above for more detail.

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### **Summary**

[Notice 2011-19](#) defines when employer securities held by an [employee stock ownership plan](#) (ESOP) are “readily tradable on an established securities market” or “readily tradable on an established market.” ESOPs should use the definition of readily tradable securities in the [final regulations](#) under Code § 401(a)(35). Under the regulations, which may be relied upon after March 14, 2011, an employer security is readily tradable on an established securities market and readily tradable on an established market if it is:

- Traded on a [registered national securities exchange](#); or
- Traded on a foreign national securities exchange that is: officially recognized, sanctioned or supervised by a governmental authority, and
- The security is [deemed](#) by the SEC as having a ready market.

Current SEC rules deem a security on the FTSE Group All-World Index to have a ready market.

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## Notice 2011-85, Sections 411(a)(13) and 411(b)(5)

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**§ 411(a)(13) &  
§ 411(b)(5):  
Notice 2011-85**

Required provision for hybrid DB plans.

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**Effective Date** The 2010 final hybrid plan regulations generally apply to plan years beginning on or after January 1, 2011. However, Treas. Reg. §§ 1.411(b)(5)-1(d)(1)(iii), (d)(1)(vi), and (d)(6)(i) apply to plan years beginning on or after January 1, 2012, which is also when the 2010 proposed hybrid plan regulations are effective.

Sections 1.411(b)(5)-1(d)(1)(iii), (d)(1)(vi), and (d)(6)(i) provide that the exclusive list of interest crediting rates and combinations of rates satisfy the requirements of Code § 411(b)(5)(B)(i).

The 2010 proposed hybrid plan regulations amend § 1.411(b)(5)-1(d), in part, by describing additional interest crediting rates that satisfy the requirements of § 411(b)(5)(B)(i).

Plans do not need to be amended for the new final regulations until a date specified in the final regulation but no earlier than plan years beginning on or after January 1 2013.

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**Summary** Section 1.411(b)(5)-1(d) sets forth rules under § 411(b)(5)(B)(i) relating to interest crediting rates under a cash balance or other statutory hybrid plan. The Service's review of an application for a determination letter submitted to the Service between February 1, 2011 and January 31, 2012, will not consider the final regulations under § 411(a)(13) (other than with respect to § 411(a)(13)(A)) and § 411(b)(5)) unless the plan has been amended to satisfy those regulations.

PPA '06 §701(b)(2) added by Code § 411(a)(13) which provided that an applicable DB plan, as defined in § 411(a)(13)(C), will not fail to satisfy the accrual requirements of § 411(a)(11), § 411(c), or § 417(e) merely because the present value of the participant's accrued benefit under the plan equals the balance in the participants hypothetical account or the accumulated percentage of the participant's final average compensation.

Also added was a 3-year cliff vesting requirement for applicable DB plans.

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## Notice 2011-85, Sections 411(a)(13) and 411(b)(5), Continued

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### **Summary** (continued)

PPA '06 §701(b)(1) added Code § 411(b)(5) that provide the requirements on the market rate of return required in a hybrid DB plan.

For additional information, see “[Hybrid Defined Benefit Plans - Final and Proposed Regulations](#),” Employee Plans News, November 5, 2010.

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## Section 414(u), Notice 2010-15

### §414(u) Notice 2010-15

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Optional provision.

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### Effective Date

Code § 414(u)(9) is effective for plan years beginning on or after January 1, 2007.

Code § 414(u)(12) is effective for plan years beginning on or after January 1, 2009.

Plans must adopt both amendments by the end of the 2010 plan year.

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### Summary § 414(u)(9)

For benefit accrual purposes, retirement plan sponsors can treat someone who dies or becomes disabled while performing qualified military service as if he or she:

- Resumed employment the day before her death or disability, and
- Terminated employment on the actual date of her death or disability.

HEART Act §104(b) added Code § 414(u)(9) that provides.

- The individual's death or disability must have occurred as a result of qualified military service, and
- For individuals who are treated as "reemployed," the plan determines their contributions and elective deferrals by the individual's average actual employee contributions or elective deferrals for the lesser of:
  - the 12-month period of service with the employer immediately prior to qualified military service, or
  - the actual length of continuous service with the employer.

See § 414(u)(9)(C).

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## Section 414(u), Notice 2010-15, Continued

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### **Summary** **§ 414(u)(12)**

Section 105(a) of the HEART Act amended Code §3401 to treat differential wage payments as wages for income tax withholding purposes. The term “differential wage payment” is defined in § 3401(h) as any payment which:

- (1) Is made by an employer to an individual with respect to any period during which the individual is performing service in the uniformed services while on active duty for a period of more than 30 days, and
- (2) Represents all or a portion of the wages the individual would have received from the employer if the individual were performing service for the employer.

This amendment applies to remuneration paid after December 31, 2008.

Section 105(b)(1)(A) of the Heart Act added Code §414(u)(12)(A), which provides:

- An individual receiving a differential wage payment is treated as an employee of the employer making the payment,
  - The differential wage payment is treated as compensation, and
  - The plan is not treated as failing to meet the requirements of any provisions described in §414(u)(1)(C) by reason of any contribution or benefit which is based on the differential wage payment.
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## Section 414(x)

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**§ 414(x)** New plan type created by PPA '06.

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**Effective Date** Plan documents can be adopted on or after January 1, 2010. Plan can be effective no earlier than the plan year in which they are adopted but in no event earlier than January 1, 2010.

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**Summary** This new plan type is for small employers not having more than 500 employees. A defined benefit plan and a qualified cash or deferred arrangement is combined into an eligible combined plan.

The DB portion of the plan must provide the lesser of:

- 1% times years of service, or
- 20% of final compensation.

Hybrid plans can use an age weighted formula of:

- 2% of comp as a contribution for those age 30 and below,
- 4% of comp for those participants from age 30-40,
- 6% of comp for those age 40-50, and
- 8% of comp for those 50 and older.

The benefits must be subject to at least a 3 yr cliff vesting schedule.

The defined contribution portion of the plan must have the following:

- A matching arrangement,
  - A matching contribution of at least 50% of first 4% deferred,
  - An automatic enrollment arrangement with a beginning rate of automatic deferral of 4% unless the participant elects otherwise,
  - All deferrals and matching contributions are immediately 100% vested, and
  - A 3-year cliff vesting schedule for non-elective contributions.
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## Section 431(b)(8), Notice 2010-83

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### **§431(b)(8) Notice 2010-83**

Optional provision.

A plan sponsor has until the earliest of these three dates to make a formal decision to apply either or both of the special funding rules for a multiemployer plan:

- (1) The deadline for certification of the plan's status under Code § 432(b)(3) for the first plan year beginning on or after January 1, 2011,
- (2) The date of certification of the plan's status under § 432(b)(3) for the first plan year beginning on or after January 1, 2011, or
- (3) June 30, 2011.

If as of the otherwise applicable deadline, a plan sponsor has been unable to reach agreement as to whether to apply either or both of the special funding rules, and, before the otherwise applicable deadline, formally decides to resolve the issue through arbitration, then the deadline is extended until 30 days after the resolution of the arbitration.

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### **Effective Date**

Effective for multiemployer plans on the first day of the first plan year ending after August 31, 2008.

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### **Summary**

Section 211(a)(2) of the Pension Relief Act of 2010 added Code § 431(b)(8) to provide two special funding rules, available to multiemployer plans. The first rule is a special amortization rule under § 431(b)(8)(A) and the second rule is a special asset valuation rule in § 431(b)(8)(B).

Notice 2010-83 provides a Q&A on how to calculate gain or loss for purposes of amortization during different periods of time.

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